F. M. S.

[PRIVY COUNCIL]

LORD TOMLIN, LORD THANKERTON,

SIR LANCELOT SANDERSON.

December 15, 1932.

THE PAHANG CONSOLIDATED COMPANY, LTD.....Appellants.

vs.

THE STATE OF PAHANG.....Respondent.

[KUALA LIPIS CIVIL SUIT No. 8 of 1931.

PAHANG CIVIL APPEAL No. 1 of 1931.

PRIVY COUNCIL APPEAL No. 27 of 1932.]

Tin and Tin-ore (Restriction) Enactment No. 23 of 1931, Sections 2 and 5, rules 2 and 34 —Power of Chief Secretary to make rules— Constitutional Law of Pahang—Powers of Sultan of Pahang.

On the 8th December, 1898 the British Resident in Pahang on behalf of the Sultan of Pahang by a lease executed on that date granted to the Pahang Corporation, of which Company the Appellants were the assigns, full mining rights in certain lands in Pahang described in the second schedule thereto. As assigns of the Pahang Corporation, the appellants were entitled to the benefit of the said lease. In February, 1931 the principal tin producing countries of the world, including the Federated Malay States, entered into an agreement to secure a fair and reasonable equilibrium between production and consumption with the object of preventing rapid fluctuations in the price of tin. In pursuance of this International Agreement the "Tin and Tin-Ore (Restriction) Enactment No. 23 of 1931" was passed on the 26th April, 1931 by the Federal Council and assented to by the Rulers of the Federated Malay States. By section 2 (i) of this Enactment the Chief Secretary to Government was empowered to make rules for restricting the production and export of tin. By virtue of these rules quotas were allowed to all tin producers including the appellants, restricting the right to produce and export tin to the amount set forth in the quotas. Before the passing of Enactment No. 23 of 1931, the appellants applied to Government for exemption from the provisions of the proposed legislation. Upon refusal by Government of the application, the appellants brought an action against the respondent by which they claimed to be exempted from any legislation restricting the amount and/or export of tin from their mines and, if they were not so exempted, to recover damages from the State of Pahang, in that the State had committed a breach of the lessor's covenants in the Lease. The trial Judge, Elphinstone, C.J. dismissed the appellants' claim. On appeal, the Court of Appeal (Prichard, J., Burton, J. and Mudie, J.) affirmed the decision of Elphinstone, C.J., Mudie, J. partially dissenting. The Appellants then appealed to the Privy Council.

Held, on appeal to the Privy Council, that Enactment No. 23 of 1931 overrides any special rights claimed by the appellants to have been conferred upon them by the Lease of 1898, and that there is sufficient indication on the face of the Enactment of an intention that the rules to be made thereunder should be wide enough to apply to every case.

Held further, that the suit against one of the Federated Malay States in respect of a matter or thing arising under or resulting from the operation of the Enactment or the Rules made thereunder is barred by Section 5 of that Enactment.

The findings of the trial Judge and of the Court of Appeal, except as to that part of the decision of Mudie on question of exemption from mining regulations, upheld.

AN APPEAL to His Majesty in Council from a judgment of the Federated Malay States Court of Appeal, which is reported in (1932) F.M.S.L.R. 131.

Wilfred Green, K.C. and the *Hon'ble Cyril Asquith* for the Appellants.

Hon'ble Sir Stafford Cripps, K.C., and *C. Stafford Crossman* for the Respondents.

Cur. Ad. Vult.

The Judgment of their Lordships (Lord Tomlin, Lord Thankerton and Sir Lancelot Sanderson) was delivered by—

LORD TOMLIN.—The appellants are a mining company incorporated in England under the English Companies Acts. As assigns of the original lessees who were the Pahang Corporation the appellants are entitled to the benefit of a lease of a large tin mine in Pahang, granted on the 8th December, 1898, by the British Resident in Pahang on behalf of His Highness the Sultan of Pahang.

The respondent is the State of Pahang which is one of the four Federated Malay States.

The appellants seek in the action out of which this appeal arises to have it declared that a certain enactment of the Federated Malay States passed in the spring of 1931, limiting the production and export of tin in and from the Federated Malay States, has no application to their mine, or, if it has, to recover damages from the State on the ground that the State in concurring in passing the enactment in question committed a breach of the lessors' covenants in the lease.

The appellants have failed in the Court of first instance and in the Court of Appeal, though in the Court of Appeal one judge dissented in part from his colleagues and would have given the appellants some relief.

The appellants now appeal to His Majesty in Council.

The constitutional position in Pahang so far as it is material to the matters under consideration in this Appeal may be summarised thus:—

(1) The Sultan of Pahang is an absolute ruler in whom resides all legislative and executive power, subject only to the limitations which he has from time to time imposed upon himself in the circumstances hereinafter mentioned.

(2) In 1888 he agreed to administer his country with the advice of a British Resident.

(3) In 1889 he appointed and there has since existed a State Council, but this is only an advisory body, and though since 1889 laws for the State have been enacted by the Sultan in Council, the legislative power has remained in the Sultan acting with the advice of the British Resident.

(4) In 1895 the Federation of the Malay States was first formed by Treaty between the States, but that Treaty did not curtail any of the powers of this Ruler of the State of Pahang within his State.

(5) By an agreement made in 1909 a Federal Council was constituted, of which the Sultan of Pahang was a member, and it was agreed that laws passed or to be passed by the State Councils should continue to have full force and effect in the States, except in so far as they might be repugnant to any law passed by the Federal Council, and that nothing in the agreement was intended to curtail any of the powers or authority held by any of the Rulers in their respective States.

(6) By a further agreement in 1927 the Federal Council was reconstructed in such manner that *(inter alia)* the Sultan of Pahang himself no longer sat on it, but was represented by the British Resident of Pahang, and it was provided (*a*) that the Federal Council should pass all laws intended to have force throughout the Federation; (*b*) that laws passed by such Council should be enacted in the following words: "It is hereby enacted by the Rulers of the Federated Malay States by and with the advice and consent of the Federal Council" and should be signed by each of the Rulers before coming into force; (*c*) that any law passed or which might thereafter be passed by a State Council should continue to have full force and effect in such State except in so far as it might be repugnant to the provisions of any law passed by the Federal Council; and (*d*) that nothing in the agreement was intended to curtail any of the powers or authority held by any of the Rulers in their respective States.

The lease of 1898, granted by the British Resident on behalf of the Sultan of Pahang, contained in substance the following provisions:—

(1) It provided for the demise to the Pahang Corporation their "successors and assigns" for a term of 77 years from the 1st September, 1891, of "full mining rights" in the area covered by the Lease, together with "full and free liberty" for the Corporation to win work and obtain from the area all the tin and other minerals therein contained and for the payment to the Treasurer of Pahang of royalties upon tin and minerals so obtained and exported from the State.

(2) The Corporation its successors and assigns were to be "exempted from payment of all duties taxes and tolls now or hereafter to become payable in the State of Pahang" with certain named exceptions.

(3) The Corporation its successors and assigns were to be "subject to the Mining Regulations and Laws from time to time in force in the State of Pahang in all matters not otherwise provided for by this Lease."

(4) The Corporation performing its covenants was to have quiet enjoyment of the premises demised during the term without any lawful interruption from or by the Sultan or any person lawfully claiming under him.

(5) The Corporation was to be entitled to assign the subject matter of the Lease to a Company or Companies formed or to be formed in Great Britain..... "subject to the approval of the Rt. Hon. The Secretary of State."

The mine comprised in the lease differs from other tin mines in Pahang in that it is not a dredge mine, but one worked by deep shafts and extensive underground workings. Constant pumping of large volumes of water is necessary to keep the mine free of water. These conditions entail heavy overhead charges which necessarily remain constant even when production is reduced. An extensive system of railways and waterways has also to be kept in order and constitute another constant item of overhead charge. In these circumstances, any limitation of production may prove serious to those working the mine.

On the 27th February, 1931, an international agreement was entered into between the tin-producing countries of the world, including the Federated Malay States, for limiting the production and export of tin from the countries of contracting parties.

In order to give effect to the obligations of the Federated Malay States under this agreement the ordinance now complained of was passed by the Federal Council, was signed by the Rulers of the Federated States, including the Sultan of Pahang and became operative on the 26th April, 1931.

Before, however, the enactment came into force, the appellants, on the 30th March, 1931, launched their action in a *quia timet* form, asking in effect to have it declared that they could not be affected by legislation limiting output and export or either of them and that if they were so affected the State would be liable in damages. The plaint was amended after the enactment became

operative in order to deal with the situation thereby created.

The enactment contained a preamble to the effect that an international agreement had been arrived at between the Governments of the principal tin-producing countries of the world, that it was desirable that the production and export of tin should be subjected for a period to control in order that an economic balance between production and consumption should be restored; that the Federated Malay States was a party to this agreement, that a scheme had been agreed to by the parties aforesaid to give effect to this policy of control and that it was necessary for the implementing of this agreement and scheme that legislative sanction and authority should be given.

The operative part of the enactment was in the following terms:—

> "1. This Enactment may be cited as 'The Tin and Tin-ore (Restriction) Enactment, 1931,' and shall be deemed to have commenced and come into operation upon the 1st day of March, 1931, and shall remain in force until the Chief Secretary to Government shall by notification in the *Gazette* order that the same do cease to be in force.
>
> "2. (i) The Chief Secretary to Government, Federated Malay States, may from time to time make rules for any of the following purposes:—
>
> (*a*) to restrict and regulate the production, possession, sale, purchase and export of tin and tin-ore;
>
> (*b*) to provide for the appointment of officers and other persons to carry out the provisions of any rules and to prescribe their duties;
>
> (*c*) to prescribe fees to be charged for anything to be done under any rules;
>
> (*d*) to prescribe the penalty with which the contravention of any rule made under this Enactment shall be punishable.
>
> "(ii) All such rules shall be published in the *Gazette* and shall thereupon have the force of law.
>
> "(iii) All such rules shall be laid before the Federal Council at the first meeting after such publication and may be amended or disallowed by resolution of the said Council.
>
> "(iv) Any rules so amended shall come into force as amended from the date of the passing of such resolution and any rule disallowed shall cease to have any force or effect from the date of such resolution.
>
> "3. Nothing in this Enactment or in any rules made thereunder shall affect the provisions of 'The Mineral Ores Enactment, 1923,' and all rules made under this Enactment shall be additional and auxiliary to the provisions of the said Mineral Ores Enactment and any rules made thereunder.
>
> "4. No decision made in exercise of the powers conferred by this Enactment of any officer or other person appointed under this Enactment regarding the quantity of tin or tin-ore which may be produced, sold, purchased, exported, or be in the possession of any person shall be called in question in any Court of Law.
>
> "5. No suit shall be instituted in any Court against the Chief Secretary to Government or against the Government of the Federated Malay States or of any of them or against any public officer in respect of any matter or thing arising under or resulting from the operation of this Enactment or the Rules made thereunder."

In August, 1931, the Chief Secretary made rules under the enactment.

By these rules substantial restrictions were imposed upon the production and export of tin and tin-ore in and from the Federated Malay States.

Rule 39 of these rules was as follows:—

> "The provisions of these rules shall apply in respect of all mining lands in the Federated Malay States held under lease or mining certificate notwithstanding any particular conditions, terms or covenants contained therein."

The appellants' case is put in two ways. *First* it is said that the enactment and the rules thereunder do not apply to the appellants' mine at all and *Secondly* it is said that if the enactment and rules do apply there has been a breach of the lessors' obligations for which damages can be recovered from the State.

The appellants support their first ground of appeal by saying that the lease contains three specialties, namely:—

(1) There is an express grant of "full mining rights."

(2) The mine is expressed to be subject to the mining Regulations and laws of the State in all matters not otherwise provided for by the lease and production is provided for by the express grant of full mining rights; and

(3) There is a covenant for quiet enjoyment.

These specialties, they say, are not affected by the enactment in question because such enactment must be construed with reference to two principles, that is to say: (1) the principle indicated by Lord Blackburn in *Garnett* v. *Bradley*, 3 A.C. 944 at page 967, in the following words: "There is another rule which has been laid down, which I think is a good rule if it is properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing and a subsequent enactment has general words which would repeal that particular law or particular custom if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it," and (2) the principle embodied in the maxim "*generalia specialibus non derogant.*"

Further, they say if this be the true construction of the enactment, the rules purporting to impinge on the appellants' rights under the lease are *ultra vires* and void.

It is unnecessary to consider what is the distinction if any between the two principles invoked in the terms in which they have been stated. It is enough to say, that whether there be two principles or one principle they or it must yield to a sufficient indication of intention to override the pre-existing specialty.

Their Lordships are satisfied that in the present case there is ample indication on the face of the enactment of an intention that the rules to be made under it should be wide enough to apply to every case, indeed, it was essential to the very purpose of the enactment that this should be so. In the circumstances their Lordships are of opinion that the scope of the enactment is such that the rules under it are *intra vires* and wide enough to cover the appellants.

The second ground of appeal under which the appellants seek if the enactment and rules are held to apply to them to recover damages from the State is rendered difficult by another consideration.

It is admitted that an action for breach of covenant can be maintained against the respondent, but it is said by the respondent that the action which the appellants contemplate is expressly prohibited by Section 5 of the enactment.

In their Lordships' opinion such an action would, within the meaning of Section 5, be a suit against one of the Federated Malay States in respect of a matter or thing arising under or resulting from the operation of the Enactment or the Rules made thereunder and could not therefore be maintained.

Having regard to the views which their Lordships entertain and have expressed as to the meaning and effect of the enactment and the rules made thereunder, it is unnecessary to consider how far the appellants' contention as to the effect of the lease are well founded and their Lordships must not be taken to express any opinion in relation thereto.

In the result, therefore, this Appeal, in their Lordships' opinion, fails and must be dismissed and their Lordships will humbly advise His Majesty accordingly.

The costs of the Appeal must be paid by the appellants.

Appeal dismissed.

Solicitors for the Appellants—*Pooley & Co.*, Kuala Lumpur, for *Drew & Napier*, Singapore; *Linklaters Pains*, London.

Solicitors for the Respondent—*The Hon'ble Mr. W. S. Gibson, Legal Adviser*, Federated Malay States; *Burchells*, London.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., WHITLEY & McFALL, JJ.

April 20, 1933.

LAU YAU WENG
LAU YAU CHI .....**Appellants**

vs.

THE BANK OF MALAYA, LTD....Respondents

[PERAK CIVIL APPEAL No. 1 of 1933]

Notice to chargor — Service — Land Code, 1926, section 138—Waiver of irregularities in form of notice by voluntary appearance of chargor.

On the 24th February 1931, land was transferred to the appellants subject to a charge in favour of the respondents. Default in payment was made and, on the 19th September, 1932, a notice under section 138 of the Land Code, 1926, which was not in the proper form, was served on the first appellant. This notice was sent by registered post to the second appellant, returned undelivered and a copy posted on the land under the provisions of section 138 (v).

On the 16th January, 1933, at the hearing of the summons under section 149, the first appellant appeared in person and the second defendant by his attorney. On this date the power of attorney had not been registered in the Federated Malay States but any objection to this was waived by the chargees.

The order for sale made on the summons was not perfected until the 21st February, 1933, and on this date the first and second appellants appeared by their solicitor to settle the form of the order. In the meantime, on the 7th February, 1933, the power of attorney was duly registered in the Federated Malay States.

On the 9th February, 1933, the first appellant and the second appellant, by his attorney, gave notice of appeal. The memorandum of appeal set out the following grounds:—

(1) That the notice served on the 19th September, 1932, was not a proper notice under section 138 of the Land Code;
(2) that the notice was not properly served on the second appellant; and
(3) that the Summons in Chambers was not properly served on the second appellant, as the power of attorney had not been registered.

Held, that before service can be effected under Section 138 (v) of the Land Code, 1926, a chargee must adduce evidence that all the methods of service prescribed in sub-sections 138 (i), (iii) and (iv) had failed or were not open to him.

Held, that the first appellant by appearing in person at the hearing of the Summons in Chambers and not objecting to the form of the notice had waived this irregularity.

Held, (by Terrell, Ag. C.J., and Whitley, J. and McFall, J., dissenting) that the second appellant by registering his power of attorney on the 7th February, 1933, and voluntarily appearing, by Counsel, on the 21st February, 1933, to settle the terms of the order on the summons, had waived any irregularities, and the order made on the summons could not be questioned by him on appeal.

Decision of Gerahty, J., affirmed.

Supramanian Chetty v. *Mohamed Ibrahim*, 3 F.M.S. L.R. 91, followed.

K. M. Coomarasamy for the appellants.

G. Terrell for the respondents.

Cur. Ad. Vult.